JD(ATL)—13—03
Knoxville, TN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

BAPTIST HOSPITAL OF EAST TENNESSEE

and **CASE 10–CA–33684**

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL, UNION, LOCAL 2001

Eileen Conway, Esq.,
for the General Counsel.
Penny A. Arning, Esq.,
for the Respondent.
Phillip R. Pope, for the Charging Party.

DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard by me by telephone on January 10, 2003, pursuant to agreement of the parties and their waiver of their right to present testimony and other evidence in person at a designated hearing site. The charge in this case was filed by the Office and Professional Employees International Union Local 2001 ("the Charging Party" or "the Union"). The complaint was issued by the Regional Director of Region 10 of the National Labor Relations Board ("the Board") and alleges that Baptist Hospital of East Tennessee ("the Respondent" or "the Hospital") violated Section 8(a)(5) and (1) of the National Labor Relations Act ("the Act") by changing its Earned Time Policy as applied to the Inpatient Radiology Unit by assigning employees to holiday work schedules without regard to employee preference or seniority which subject matters are a mandatory subject of bargaining and that Respondent implemented this charge without affording the Union prior notice and an opportunity to bargain as the exclusive representative of Respondent's employees. The Respondent has by its answer denied the commission of any violations of the Act.

A joint Motion at the hearing to submit this case to the undersigned Administrative Law Judge upon a stipulated record was filed by all three parties to this case. Accordingly, in order to effectuate the purposes of the Act and under the authority

of Section 102.35(a)(9) of the Board's Rules and Regulations, I granted the Motion to hear this case on the basis of a stipulated record. The parties agreed that the Charge, Complaint and Notice of Hearing, Answer, Stipulation of Facts, Joint Exhibits 1 and 2 constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge and the right to file with the Board exceptions to the findings of fact but not to conclusions of law or recommended orders which the administrative law judge shall make in his decision. The Stipulation of Facts is as follows:

> Without waiving objections as to relevance or weight, the parties stipulate to the following facts:
>
> 1. Respondent is a not-for-profit acute-care hospital located in Knoxville, Tennessee. The hospital employs approximately 2,400 employees and has a long-standing collective-bargaining relationship with the Union which represents a unit of approximately 178 employees who work in several areas of the hospital, including the inpatient radiology unit of the imaging department. Respondent and the Union are signatory to a series of collective-bargaining agreements; the agreement relevant to resolution of this dispute covered the period November 1, 1999 through October 31, 2002 and is referred to herein as the "contract" (Jt. Exh. No. 1).
>
> 2. Respondent classifies all paid time off as "earned time" described in and administered pursuant to Respondent's Earned Time policy. (Jt. Exh. No. 2). The Earned Time policy applies to all hospital employees. The Earned Time policy is referred to at Article XIX of the contract.
>
> 3. Because not all departments of the Hospital are open twenty-four hours per day, seven days per week, various departments handle holiday scheduling in different ways.
>
> 4. The inpatient unit of the imaging department has had a long-standing practice of preparing holiday schedules under a procedure called "Holiday Guidelines". (Jt. Exh. No. 3). Radiology technologist Richard Keller, a 20-year employee of the inpatient unit of the imaging department, would testify that the Holiday Guidelines have been in effect throughout the term of his employment. Joint Exhibit Numbers 4, 5, and 6 show the holiday schedules for the inpatient unit of the imaging department for the years 1999, 2000 and 2001 which were prepared consistently with the Holiday Guidelines provisions.
>
> 5. On or about January 1, 2002 Roger Rhodes, Director of the Imaging Department announced a change in holiday scheduling for the inpatient department applicable to dates in 2002. Joint Exhibit Number 7 is the 2002 schedule. Under the new procedure employees were scheduled

to cover holiday work shifts by the team leader, a statutory supervisor, without regard to employee preference or seniority, and those assignments rotate annually. The change was made without prior notice to the Union. The change did not affect any employee's accrued earned time balance or the manner in which employees continued to accrue earned time. If called to testify, Mr. Rhodes would testify consistently with his affidavit and it is incorporated herein by reference. (R. Exh. No. 1). J. Scott Shaffer is Respondent's Vice President of Human Resources. If called to testify, Mr. Shaffer would testify consistently with his affidavit and it is incorporated herein by reference. (R. Exh. No. 2).

6. As set forth more fully in Mr. Shaffer's affidavit, holiday scheduling practices and unilateral changes in other departments may be summarized as follows.

a. In the respiratory care department the practice for many years was to have a rotating holiday schedule for Christmas Eve and Christmas Day so that employees who worked on those holidays in one year would not have to work on those holidays in the following year. Until 2001 the department treated Thanksgiving as any other work day. In 2001 management changed the practice, rotating Thanksgiving coverage along with Christmas Eve and Christmas Day.

b. In the laboratory services department, employees rotate July 4 and Labor Day holidays and employees must work on one of the three major holidays, Thanksgiving, Christmas and New Year's Day. Under this practice an employee who works Christmas one year would not have to work on Christmas the following year.

c. In the surgery department the director posts a blank holiday schedule for the entire year and employees select the holidays they wish to work. If there are holidays with insufficient coverage the director assigns coverage without regard to employee seniority.

d. In the rehabilitation services department management initiated in April 2001 a practice requiring certified occupational therapy assistants and physical therapy assistants work rotating weekend and holiday schedules.

e. In the heart institute and the cath lab management began requiring holiday work approximately four or five years ago.

f. The foregoing holiday scheduling practices were adopted unilaterally without objection from the Union. The issue of holiday scheduling practices has never been addressed by

the Union in the form of a request to bargain or a grievance.

7. As noted above, the Hospital applies various holiday scheduling procedures in different departments. From time to time the procedures have been changed by management, without notice to or objection from the Union. Union representative Phillip Pope would testify that the Union was unaware of any such changes until Respondent filed its Motion for Summary Judgment in the instant case and that the Union would have objected to the changes had it been informed.

8. Director Rhodes changed the holiday scheduling practice in the inpatient radiology unit of the imaging department because employees in the department complained that the scheduling system was unfair and in an effort to recruit and/or retain technologists for the department.

9. Union representative Phillip Pope would testify that the Union learned of the change in the inpatient radiology unit in January 2002 but did not file a grievance because under the terms of the contract's grievance and arbitration clause the matter is not arbitrable before a neutral party. (Jt. Exh. No. 1; Article V).

Administrative Law Judge (ALJ) Exhibit 1a (the Charge), 1b (the Complaint and Notice of Hearing), 1c (the Answer) and ALJ Exhibit 2a (Motion To Waive Hearing And Submit Case To The Administrative Law Judge Upon A Stipulated Record) and ALJ Exhibit 2b (Stipulation of Facts) are included as exhibits as a part of the official record in Case 10-CA-33684.

Issue

The central issue in this case is whether Respondent's unilateral change in procedure for holiday scheduling in the inpatient radiology unit of the imaging department violated the Act.

Positions of the parties

The General Counsel contends that Director of Imaging, Roger Rhodes', unilateral implementation of a new procedure for scheduling holiday work for bargaining unit employees in the inpatient radiology department constituted a unilateral change in a mandatory subject of bargaining and thereby violated Section 8(a)(1) and (5) of the Act as Respondent did not provide the unit employees' collective bargaining representative with notice and a meaningful opportunity to bargain about the changes, citing ***NLRB v. Katz***, 369 U.S. 736 (1964); ***Mercy Hospital of Buffalo***, 311 NLRB 869, 873 (1993). General Counsel contends the unilateral change imposed in this case was "a substantial, and a significant one" and had a real impact on or was a significant detriment to the employees or their working conditions, citing ***Outboard Marine Corp.***, 307 NLRB 1333,

1339 (1992). General Counsel also contends that the Board has consistently found that schedules and hours are mandatory bargaining subjects. ***Morgan Services***, 336 NLRB No. 21 (2001) citing ***Our Lady of Lourdes Health Center***, 306 NLRB 337, 339 (1992). The General Counsel further notes that the Board has held that vacation scheduling is a mandatory subject of bargaining citing ***Beverly Health & Rehabilitation Services, Inc.***, 335 NLRB No. 54 (2001); ***Blue Circle Cement Co.***, 319 NLRB 954, 960 (1995).

General Counsel further contends that Respondent's contractual defenses are without merit. She states in her brief that to "the extent that Respondent's change involves the application of the Earned Time Policy as opposed to the specific terms of the policy, a practice such as the holidays guidelines at issue here constitutes 'an implied term and condition of employment by mutual consent of the parties' which under well-established precedent, may not be changed without prior notice to the Union and opportunity to bargain," citing ***Riverside Cement Co.***, 296 NLRB 840, 841 (1989). She further contends that this "is so even if the practice may have constituted a deviation from the letter of the parties' agreement, citing ***The Sacramento Union***, 258 NLRB 1074, 1075 (1981). Accord: ***Keystone Steel & Wire v. NLRB***, 41 F.3d 746 (D.C. Cir. 1994). See also ***Pontiac Osteopathic Hospital***, 336 NLRB 101 (2001) unilateral change in procedure for scheduling leave unlawful.

General Counsel further contends that the Respondent was not privileged to change the holiday scheduling procedure by the language of the contract's Management Rights clause as the plain language of the Management Rights clause is "subject only to provisions expressly specified in the Agreement." However the Earned Time Policy is a "provision expressly specified" at Article XIX of the collective bargaining agreement. General Counsel then argues that the Management Rights clause is irrelevant to resolution of this dispute.

General Counsel argues that Respondent's second contractual defense asserts that Article XIX of the contract requires the Hospital to notify the Union of proposed changes in personnel polices or benefits only when those changes apply to all employees on a hospital-wide basis. The Article states, "in the event the Hospital proposes changes in personnel policies or benefits for all employees, hospital-wide, it will notify the Union in writing of the proposed changes." General Counsel argues that "while the provision requires written advance notice of changes in policies or benefits which affect non-unit as well as unit employees, it does not vitiate the statutory requirement to provide advance notice to the Union when Respondent intends to change policies which affect only unit employees."

Although Respondent has undeniably made unilateral changes in holiday scheduling policy in other departments affecting unit employees without notice to or objection from the Union, General Counsel argues that "repeated undermining of the Union does not convert an otherwise unlawful act into a lawful one." ***NLRB v. C&C Plywood Corp.***, 385 U.S. 421, 430 fn 15 (1967). General Counsel also notes that "the change in the inpatient radiology department is inconsistent not only with Holiday guidelines but also with the specific requirement of the Earned Time Policy itself which

states that Earned Time is to be scheduled based on employee's choice and hire date seniority."

In her closing statement the General Counsel points out that the Earned Time Policy is a contractual benefit and also notes that the Earned Time Policy permits an occasional disregard of seniority but not a wholesale change in a practice. General Counsel further submits that Respondent's reasons for changing the holiday policy practice are irrelevant to this Section 8(a)(5) analysis as motive is not an element of an 8(a)(5) violation.

In her brief Respondent's Counsel notes that there are varying holiday scheduling practices in various hospital departments which apply to employees covered by the collective bargaining agreement as well as to other employees and that these varying holiday practices were all adopted unilaterally without objection from the Union.

Respondent's brief notes that in 2001, there was a fairly substantial turnover of technologists in the Inpatient Radiology Unit. Technologists in the unit complained to Respondent's Director of Imaging "that the holiday scheduling in the unit was inconsistent with other departments, and was unfair because it allowed the same senior employees to always have the same major holidays off. This meant newly hired employees and employees with less seniority, would always end up having to work on major holidays." This issue was adversely affecting morale and making it more difficult to hire new radiological technologists. Rhodes therefore implemented a rotational method of scheduling holiday work in the Inpatient Radiology unit. Under the new schedule posted on January 9, 2002, and discussed in a staff meeting with employees on January 14, 2002, each employee was assigned a particular holiday to work and those assignments rotate annually. Respondent's Counsel contends that nothing in the collective-bargaining agreement prohibited the change in the holiday schedule in reliance on Article 1.1 of the contract which grants management the exclusive right "to determine and change starting times, quitting times and shifts"; the right "to establish, change and abolish its policies, practices, rules and regulations and to adopt new policies, practices, rules and regulations"; and the right "to determine or change methods and means by which its operations are to be carried on." Respondent's Counsel also relies on contract Article XIX – Preservation of Benefits which states, "In the event the Hospital proposes changes in personnel policies or benefits for all employees, hospital wide, it will notify the Union in writing of the proposed changes and if the Union chooses to negotiate over the proposed changes it will notify the Hospital in writing within the above mentioned 30 day period." Respondent's Counsel notes that the scheduling change at issue applied only to the Inpatient Radiology Unit and was not hospital-wide.

Respondent notes in its brief that the management rights clause in the labor agreement gives it the exclusive right "to determine and change quitting time and shifts," the exclusive right "to establish, change and abolish its policies, practices, rules and regulations and to adopt new policies, practices, rules and regulations," and the exclusive right "to determine or change methods and means by which its operations are to be carried on." Respondent contends that the rights "in this clause plainly include the right

to schedule employees," and that the change in holiday scheduling in the Inpatient Radiology Unit is a schedule change, "No employees' earned time was affected or altered and each employee continued to accrue earned time as provided for in the earned time policy. The schedule change affected only when employees in the Inpatient Radiology group could use their accrued time for holidays, not whether they could use it."

Respondent contends that the Union waived its right to bargain concerning the holiday scheduling under the management rights clause in the collective bargaining agreement. Respondent further contends that the holiday scheduling issue is covered by the agreement. Respondent cites ***NLRB v. United States Postal Service***, 8 F.3d 832 at 838 (D.C. Cir. 1993) wherein the Court reversed the Board's finding of a violation by a unilateral change in work schedule by the Postal Service and the Board had held that there was no waiver because the management rights clause did not specifically refer to work schedules. The Court held that the Board's reading of the clause was far too "crabbed" and that the management rights clause was broad enough to "permit an employer unilaterally to rearrange its employees' work schedules." Respondent also cites ***Uforma/Shelby Business Forms Inc. v. NLRB***, 111 F.3d 1284 (6th Cir. 1997) at 1290 in which the management rights clause granted the employer the right "to schedule and assign work to employees; to establish and determine job duties and the number of employees required thereof . . . [and the right] to hire, layoff or relieve employees from duties . . . ." The Board held this language did not waive the union's right to bargain over the employer's decision to abolish a third shift, reschedule twelve employees to different shifts and lay off five other employees. In reversing the Board and denying enforcement the Court held:

> Although the language does not state that petitioner may 'eliminate a shift,' it reserves to petitioner the exclusive ability to schedule and assign work, determine the number of employees required for a job, and layoff or relieve employees from duties. These broad powers necessarily encompass the ability to reschedule and lay off the members of a given shift, regardless of whether petitioner is affecting one or one hundred employees.

Respondent argues that these cases support its position that its management rights clause gave it the right to schedule employees for holiday work and the right to change the way in which earned time is accrued. The scheduling change did not alter employees' accrued earned time benefits or affect the way in which earned time is accrued. It did not change or alter any employees' hours, wages, accrued benefits or the way in which those benefits are calculated. The rotational schedule did not determine whether employees could use earned time benefits. It simply determined when employees could use earned time benefits. The Earned Time policy is not "a provision expressly specified in the Agreement" as contended by the General Counsel. Other than the management rights clause, there is nothing in the Agreement that relates to the scheduling of holiday work.

The General Counsel's interpretation of Article XIX, Preservation of Benefits is equally wrong. General Counsel argues that by virtue of Article XIX, the entire earned

time policy is incorporated into the collective bargaining agreement and becomes a provision "expressly specified in the Agreement" within the meaning of the management rights clause and argues from this that the management rights clause does not authorize the Respondent to change the holiday schedule unilaterally. Nothing in the Agreement supports the conclusion that the earned time policy is a provision "expressly specified in the Agreement." General Counsel's argument ignores the obvious purpose of Article XIX which is to require the Hospital to notify the Union when (and only when) it "proposes changes in personnel policies or benefits for all employees …" and to bargain if the Union makes timely request. Article XIX is inapplicable here because the schedule change at issue in this case, did not apply to all employees, but only to those in the Inpatient Radiology Unit and because the change did not affect the level of anyone's earned time benefit. Moreover Article XIX says, "This Article [XIX] is not intended to interfere or conflict with Management rights as set forth in Article I of this Agreement."

Analysis

I find that the Respondent did not violate the Act by its unilateral change in the holiday schedule in the Inpatient Imaging group abolishing the old policy based on seniority and employees' preference and replacing it with a rotational policy.

Initially, I find in agreement with the General Counsel's position as set out above that the unilateral imposition of the scheduling procedure in the Inpatient Imaging department constituted a unilateral change in a mandatory subject of bargaining. I also find that the unilateral change was a substantial and material change and had a real impact on or was a significant determent to the employees or their working conditions. I also find that the Respondent's motive for making the change is irrelevant to the issue in this case as motive is not an element of a Section 8(a)(5) violation. I also find as contended by the General Counsel that unilateral changes in holiday scheduling policy in other departments affecting unit employees without notice to or objection from the Union would not convert an otherwise unlawful act into a lawful one.

I do find however, in agreement with the Respondent's position that the language of the management rights clause is broad enough to cover the change in the scheduling procedure made in this case. That clause specifically gives management the right to change starting times, quitting times and shifts and to determine or change methods or means by which its operations are to be carried on. I find that the rights granted in this clause clearly include the right to make schedule changes. Therefore its right to make schedule changes is covered by the Agreement. I further find that no employees earned time was affected or altered as each employee continued to accrue earned time as provided for in the earned time policy. The schedule change affected only when the employees could use their accrued time for holidays but did not entail any loss of their accrued time. I further find that Article XIX–Preservation of Benefits and the Earned Time policy do not specifically address the issue of the schedule change in this case and I find they do not afford any assistance in deciding this case. Rather as noted above I find that the Management Rights clause clearly afforded the Respondent the right to make the schedule change as it did in this case.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

ORDER[1]:

The complaint is dismissed in its entirety.

Dated at Washington, D.C.

Lawrence W. Cullen
Administrative Law Judge

1 If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.